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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/038,438	01/07/2002	Merle Dana Sears	10366	9488

7590 02/25/2004  
William W. Habelt  
Carrier Corporation  
P.O. Box 4800  
Syracuse, NY 13221

EXAMINER

LEO, LEONARD R

ART UNIT	PAPER NUMBER
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3753

DATE MAILED: 02/25/2004

*14*

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/038,438

Applicant(s)

SEARS ET AL.

Examiner

Leonard R. Leo

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-- Th MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 08 December 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 6-10 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 6-10 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 January 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ 6) ☐ Other: \_\_\_\_\_

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**DETAILED ACTION*****Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on August 27, 2003 and December 8, 2003 has been entered.

Claims 1-5 are cancelled, and claims 6-10 are pending. The amendment filed on December 8, 2003 presents an improper amendment to the claims. Claim 6 does not reflect all underlined additions and bracketed deletions from the pending claim on January 21, 2003. The status of all claims, i.e. claim 9, is incomplete. Despite these oversights, an action on the merits is as follows.

***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

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Claims 6-10 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 4 of U. S. Patent No. 6,564,79 in view of Dempsey.

The patent claims all the claimed limitations of the application except the specific heat exchanger.

Dempsey discloses a clamshell heat exchanger 32-36 comprising a pair of sheet metal panel sides having a plurality of sequential passages for the purpose of achieving a desired heat exchange.

Since the patent and Dempsey are both from the same field of endeavor and/or analogous art, the purpose disclosed by Dempsey would have been recognized in the pertinent art of the patent.

It would have been obvious at the time the invention was made to a person having ordinary skill in the art to employ in the patent a clamshell heat exchanger comprising a pair of sheet metal panel sides having a plurality of sequential passages for the purpose of achieving a desired heat exchange as recognized by Dempsey.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 6-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aid in view of Dempsey.

Aid discloses all the claimed limitations except being composed of metal.

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Dempsey discloses a panel heat exchanger comprising a pair of panel sides composed of metal for the purpose of achieving a desired heat exchange.

Since Aid and Dempsey are both from the same field of endeavor and/or analogous art, the purpose disclosed by Dempsey would have been recognized in the pertinent art of Aid.

It would have been obvious at the time the invention was made to a person having ordinary skill in the art to employ in Aid panel sides composed of metal for the purpose of achieving a desired heat exchange as recognized by Dempsey. Furthermore, it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

Regarding claim 9, Dempsey discloses it is well known in the art to form a heat exchanger from either a pair of separate sheets or a single folded sheet. In the combination of references, Aid discloses the pocket extends through the sheets, where Dempsey discloses the folded edge is opposite the inlet and outlet edge.

#### ***Allowable Subject Matter***

Claim 10 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

#### ***Response to Arguments***

The drawing objection is withdrawn.

The rejection under 35 USC 112, second paragraph, is withdrawn.

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Applicant's arguments have been fully considered but they are not persuasive.

Applicants' remarks with respect to the structure of Aid are mistaken. Aid (column 6, lines 42-44) clearly discloses the device is composed of "*two sheets of plastic ... secured together.*"

Thus, any remarks with respect to a unitary molded structure are moot.

The secondary reference of Dempsey clearly teaches one ordinary skill in the art to employ sheets composed of metal for the purpose of achieving a desired heat exchange.

Applicants' silence with respect to *In re Leshin* is deemed to be an admission. As further evidenced by Holowczak et al, plastic clamshell heat exchangers are well known in the art.

Thus, plastic and metal are well known clamshell heat exchanger materials.

Applicant is reminded of his duty to disclose under 37 CFR § 1.56, which states in part:

Duty to disclose information material to patentability.

(a) A patent by its very nature is affected with a public interest. The public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability. Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section. The duty to disclose information exists with respect to each pending claim until the claim is cancelled or withdrawn from consideration, or the application becomes abandoned.

The existence of U.S. Patent No. 6,564,795 was not furnished by applicants. The Examiner requests any and all pertinent information with respect to the instant application, the above patent and any copending applications known by applicants, assignee and applicants' representative.

### ***Conclusion***

Any inquiry of a general nature, relating to the status of this application or clerical nature (i.e. missing or incomplete references, missing or incomplete Office actions or forms) should be directed to the Technology Center 3700 Customer Service whose telephone number is (703) 306-

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5648. Status of the application may also be obtained from the Internet: <http://pair.uspto.gov/cgi-bin/final/home.pl>

Any inquiry concerning this Office action should be directed to Leonard R. Leo whose telephone number is (703) 308-2611.

A handwritten signature in cursive script, appearing to read "Leonard R. Leo".

LEONARD R. LEO  
PRIMARY EXAMINER  
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February 22, 2004